**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**APPELLATE SIDE.**

APPEAL FROM ORDER NO. 887 OF 2003.
WITH
APPEAL FROM ORDER NO. 888 OF 2003.
WITH
APPEAL FROM ORDER NO. 889 OF 2003.
WITH
APPEAL FROM ORDER NO. 890 OF 2003.
WITH
APPEAL FROM ORDER NO. 891 OF 2003.
WITH
APPEAL FROM ORDER NO. 892 OF 2003.
WITH
APPEAL FROM ORDER NO. 893 OF 2003.
WITH
APPEAL FROM ORDER NO. 894 OF 2003.
WITH
APPEAL FROM ORDER NO. 895 OF 2003.
WITH
APPEAL FROM ORDER NO. 896 OF 2003.
WITH
APPEAL FROM ORDER NO. 897 OF 2003.
WITH
APPEAL FROM ORDER NO. 898 OF 2003.
WITH
APPEAL FROM ORDER NO. 899 OF 2003.
WITH
APPEAL FROM ORDER NO. 900 OF 2003.

Subhash Bhimashankar Kalase. ... Appellant.
vs.
State Bank of India. ... Respondents.

Shri G.S. Godbole for the appellant.
Shri G.D. Uttangale for the respondent-Bank.

**CORAM: V.C.DAGA,J.**
**DATED: 09-08-2004.**

**ORAL JUDGMENT**

. This batch of appeals is directed against the order dated 30th April 2003 passed below Ex.12 in Spl.Civil

Suit No.274 of 2002, by the Joint Civil Judge, SD, Solapur, whereby objections preferred by the appellant/3rd party; objecting to the attachment of their property under Order 38 Rule 5 of the Civil Procedure Code (the "C.P.C." for short) were rejected.

**FACTUAL MATRIX:**

2. The factual matrix lies in narrow compass. The State Bank of India, respondent No.1, -original plaintiff ("the plaintiff" for short) made available various financial facilities to respondent No.2-original defendant No.1, ("**the borrower"** for short) Respondent- No.3-original defendant No.2 ("the guarantor" for short) guaranteed repayment of the various financial facilities availed by the borrower

3. The amount of various loan facilities were made available by the plaintiff-Bank to the defendant No.1 against security of his own immovable property bearing Sub-plot No.82, F.P. No. 26, Survey No.156-A along with structure standing thereon and also against the security of immovable property of the guarantor bearing CTS No. 10430 F.P. No. 21/52, TPS; 1, Solapur. The said properties were equitably mortgaged, in favour of the Bank, by the defendants to

secure various loan facilities made available by the plaintiff- Bank.

4. The property which was mortgaged by the guarantor in favour of the Bank was sold by him on 13.6.2001 by executing a registered sale deed in favour of one Sidhram Shamrao Kore for Rs.6,00,000/-. The said transaction of sale finds place in the record of the Sub-Registrar, Solapur, at Sr. No.2956. The name of purchaser Shri Sidhram Shamrao Kore also finds place in the record of City Survey.

5. The appellant, Shri Subhash desired to purchase the aforesaid property from Shri Sidhram Kore. He, after some negotiations, entered into an agreement for purchase on 21.10.2001. He, prior to purchase, issued a public notice in daily "Sanchar" having wide circulation in Solapur, to invite objections if any, to the said proposed transaction of purchase. He did not receive any objection. He, thus,purchased the said property by a registered sale-deed dated 4.10.2001 from Shri Sidhram Kore, registered at Sr.No. 5255. On 28.1.2002, the name of the appellant was entered in the PR Card of the said property.

6. Respondent No.1-plaintiff bank filed 13 separate

suits bearing Spl.Civil Suit Nos. 258/02 to 268/02 and 273/02 to 275/02 against the principal borrower and guarantor, original defendant Nos. 1 and 2/ respondent Nos. 2 and 3 herein; for recovery of their outstanding dues in various loan accounts.

7. In each suit, respondent No.1-Bank moved separate application under Order 38 Rule 5 of the C.P.C. for attachment before judgment. The trial Court directed attachment before judgment of the property bearing CTS No. 10430, FP No. 21/52, TPS 1 of Solapur, under Order 38 Rule 5 of the C.P.C.

8. The appellant, on 25.11.2002 came to know about the exparte order of attachment before judgment. He, therefore, moved separate applications in all the suits for vacation of the order of attachment, contending that he having become owner of the property before filing suits and that not being party to the suits, his property could not have been attached. He also contended that he being a purchaser of the suit property from vendee of the guarantor, did not know about the loan transaction between parties to the suit as such he being a bonafide purchaser his property in question could not have been attached. He, thus, urged that the said property is not available for

attachment.

9. The original plaintiff bank countered aforesaid challenge to the attachment before judgment, contending, the property in question being equitably mortgaged by defendant No.2, with the Bank on 25.11.1997, the same could not have been sold by him. The plaintiff-bank also urged that issuance of public notice is of no consequence. The title deeds of the property in question being in possession of the bank, it was obligatory on the part of the purchaser to make enquiry about whereabout of the original title documents of the suit property. Since he did not ask for the title deeds of the property it has to be presumed that he had a knowledge about the equitable mortgage and loan liability outstanding against the security of the property in question. As such appellant cannot be said to be a bonafide purchaser of the suit property.

10. The trial Court after hearing both parties to the suits and after considering objections of the appellant to the various orders of attachment before judgment rejected prayer for withdrawal or vacation of the orders of attachment before judgment vide its

separate orders, all dated 30.4.2003. Those orders are more or less common in all cases. All these orders are subject matter of challenge in the present appeals.

**Submissions:**

11. Shri Godbole, learned Counsel appearing for the appellant in all these appeals urged that the impugned orders suffer from an error apparent on the face of the record since learned Judge did not consider the provisions of Order 38 Rule 5 of the C.P.C. in its proper perspective. In his submission, trial Court ought to have seen that under Order 38 Rule 5 of C.P.C., property owned by the party-defendants can only be attached. He submits that the property in question admittedly, belonged to the appellants on the date of order of attachment. Since the property had already been transferred in favour of the appellant much prior to filing of suits in question, the provisions of Order 38 Rule 5 of the C.P.C. could not have been invoked. The trial Court had no jurisdiction to attach property which was already sold by the defendant No.2, guarantor even prior to the institution of the suit. In his submission, this provision can only be invoked here the defendant

intends to transfer his property to defeat the fruits of the decree. There could not be an intention to dispose of or transfer property or remove it from local limits of the jurisdiction of the Court with intent to obstruct or delay the execution of the decree where suit itself was not filed in the Court and of which defendant had no notice. He reiterated that the property was purchased and mutated in the name of the appellant in the month of January, 2002, much prior to filing of suit as such property in question could not have been attached by the trial Court. He, therefore, urged that the impugned order is unsustainable in law and liable to be quashed and set aside.

12. Per contra, learned Counsel for the respondent bank tried to support the impugned order and contended that the property in question being equitably mortgaged in favour of the bank, whosoever has purchased the property; has purchased it subject to the encumbrances on the property; as such the property was available for attachment., He urged that once property is mortgaged it continues to remain mortgaged so long as mortgagor does not satisfy his liability. In his submission, this rule is summed up in a maxim of equity, "once a mortgage, always a

mortgage". The thus, tried to support the orders passed by the trial Court.

**The Issue:**

13. The substantive issues for consideration are:

> **(1) Should the claim of the respondent No.1-Bank to the property under order of attachment be accepted or not?**
>
> **AND**
>
> **(2)Whether the sale deed obtained by the appellant would prevail over the order of attachment before judgment obtained by the plaintiff-Bank.**

**STATUTORY PROVISIONS:**

14. With a view to appreciate the aforesaid issue, I may first refer to the relevant provisions which have direct bearing on the question.

Order 38 Rule 5 of the C.P.C., reads as under:

> "5.(1) Where at any stage of a suit, the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,-
>
> (a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdictions of the court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void.

10. Attachment before judgment shall not affect the rights, exiting prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree."

15. The above extracted provisions itself make it clear that the attachment before judgment would be made where the court is satisfied that the defendant is about to dispose of whole or part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of

court with the intention to obstruct or delay the execution of any decree that may be passed against him. Thus, the provision would apply where the defendant is about to dispose whole or part of the property and not where the property has already been disposed of much before the filing of the suit. In the case in hand, sale deed has already been executed by the defendant No.2 in favour of a third person. A transaction of sale having already taken place; even prior to the institution of a suit, can it be said to have been made with the intention to obstruct or delay the execution of any decree that may be passed in the suit. Answer has to be in negative.

16. The object of the provision of Order 38 Rule 5 is to prevent any attempt on the part of the defendant to defeat the realisation of the decree that may be passed against the defendant. Order 38 Rule 8 provides a provision for adjudication of claim to property attached before judgment.. Where any claim is preferred to property attached before judgment, such claim has to be adjudicated upon in the manner provided for the adjudication of claims to the property attached in execution of decree for the payment of money. It is very clear from the provisions of Order 38 Rule 8 that the procedure to be

followed in the adjudication of claims under that rules is same as that provided by Order 21 Rule 58 for adjudication of claims to property attached in execution of a decree.

Provision of Order 38 Rule 5 of the C.P.C. also makes it clear that attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit.

17. In short, the claimant to the property attached before judgment has to show that on the date of attachment, he had some interest or was possessed of the property attached. The appellant herein is claiming interest in the property in dispute and it is required to be adjudicated upon as provided by Order 21 Rule 58 of C.P.C. The property in question, admittedly, belonged to the appellant. He is in possession of the property in question. He purchased this property on 4.10.2001. The defendant No.2 has no interest in the property as on the date of attachment. Appellant has a direct interest in the property. He being in possession of the property, he has a right to object to the order of attachment before judgment passed under O.38 R.5 of C.P.C. His property could not have been attached under this provision. Firstly;

because, he is not a party to the suit. secondly, because he has become owner of the property much before filing of the suit as such order of attachment is bad and illegal.

18. In **Vennarakkal Kallalathil Sreedharan vs. Chanmdramaath Balkrishnan 1990(3) SCC 291** a bench of two Judges considered a question identical to the question raised in these cases. The facts were that 80- cents of land were agreed to be sold in favour of the appellant under an agreement dated October 9,1978. Before the sale deed was executed, a third party; in execution of a decree got the property attached on November 16,1978. The sale deed was executed on November 23,1978. On the above facts it was held as under: (SCC page 292)

> "We may first draw attention to some of the relevant statutory provisions bearing on the question. Order XXXVIII Rule 10 of the Code of Civil Procedure provides that attachment before judgment shall not defeat the rights existing prior to the attachment of persons not parties to the suit. Under section 40 of the Transfer of Property Act, a purchaser under a contract of sale of land is entitled to the benefit of an obligation arising out of the contract and it provides that the obligation may be enforced inter alia against a transferee with notice. Section 91 of the Trusts Act also recognises this principle that the transferee with notice of an existing contract of which specific performance can be

> enforced must hold the property for the benefit of the party to the contract. These are equitable rights though not amounting to interest in immovable property within the meaning of section 54 of the Transfer of Property Act which declares that a contract of sale does not create an interest in the property. On this line of reasoning it has been held by the Madras High Court that the purchaser of ( sic under) an antecedent agreement gets good title despite attachment."

Their Lordships considered and affirmed the view has taken by the Bombay and Calcutta High Courts, in the case of Kulkarni vs. Gurlingappa Muthal AIR 1941 Bom.198; Vant Shankar vs.Pyaraji Tamboli AIR 1943 Bom 145 and Purna Chandra vs. Daulat Ali, AIR 1973 Cal.432 respectively. The view taken by Punjab and Haryana High Court in Mohinder Singh v. Nanak Singh AIR 1971 P & H 381 was overruled. It was observed as under :

> "In our view, the view taken by the High Courts of Madras, Bombay, Calcutta and Ttravancore-Cochin in the aforesaid cases appears to be reasonable and could be accepted as correct. The agreement for sale indeed creates an obligation attached to the ownership of property and since the attaching creditor is entitled to attach only the right, title and interest of the judgment-debtor, the attachment cannot be free from the obligation incurred under the contract for sale. Section 64 CPC no doubt was intended to protect the attaching creditor, but if the subsequent conveyance is in pursuance of an agreement for sale which was before the attachment, the contractual obligation arising therefrom must be allowed to prevail over the rights of the

> attaching creditor. The rights of the attaching creditor shall not be allowed to override the contractual obligation arising from an antecedent agreement for sale of the attached property. The attaching creditor cannot ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor. We cannot, therefore, agree with the view taken by the Punjab and Haryana High Court in Mohinder Singh's case."

In the above case, the Apex Court has gone even to the extent that not only a sale deed but even an agreement of sale will prevail over attachment before judgment made subsequent to such agreement for sale. The 3 Judge-Bench in the case of Hamda Anmal vs. Avadiappa Pathar, 1991(1) SCC 715 without expressing any opinion with regard to the case of an agreement for sale, proceeded to hold that sale deed having been executed prior to attachment before judgment, though registered subsequently will prevail over the attachment before judgment.

19. In the above view of the settled law, the trial Court could not have attached the property of the appellant under O.38 R.5. The impugned order in all these appeals, therefore, is liable to be quashed and set aside, and appeals deserve to be allowed.

2o. At this juncture, it needs to be clarified that

this Court has examined only validity of the impugned order of attachment before judgment, dated 10.10.2002, passed Order 38 Rule 5 of the C.P C., with respect to the property of the appellant. The question as to whether bank would be entitled to lay its hands on the property in question; it being mortgaged with them, on the maxim of equity, "once a mortgage, always a mortgage" has not been examined by this Court, as the said issue is not involved in the present appeals. It would be open for the bank to raise appropriate contentions in this behalf. In the event of such contention being raised, it would always be open for the appellant to counter the same. At the same time it would also be open for the Court trying such question to adjudicate upon it on its own merits in accordance with law.

21. In the result, all these appeals are allowed. All impugned orders are quashed and set aside. No order as to costs.